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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**THIRD APPELLATE DISTRICT**

**(Shasta)**

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THE PEOPLE,

Plaintiff and Respondent,

v.

JONAS HAMBY MUSE,

Defendant and Appellant.

C060620

(Super. Ct. No. 08F4750)

Under a plea agreement, defendant Jonas Hamby Muse received a stipulated five-year state prison term, which included the three-year upper term for receiving stolen property (Pen. Code, § 496, subd. (a))<sup>1</sup> and two years consecutive for prior prison terms (§ 667.5, subd. (b)). Defendant did not obtain a certificate of probable cause. (§ 1237.5.)

Defendant contends one prior prison term enhancement must be stricken as a matter of law because he served only one prison term for both convictions. This claim attacks the trial court's authority to impose the agreed-upon sentence. Since such claims

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

cannot be raised on appeal without a certificate of probable cause, we shall dismiss the appeal. (*People v. Cuevas* (2008) 44 Cal.4th 374, 376-377 (*Cuevas*); *People v. Shelton* (2006) 37 Cal.4th 759, 763, 769 (*Shelton*).)

### **PROCEDURAL BACKGROUND**

As the facts of defendant's offense are immaterial to his contention on appeal, we omit them.

The complaint (refiled as an information after defendant waived preliminary hearing) alleged that defendant received stolen property (§ 496, subd. (a)--count 1), had incurred a prior strike conviction for first degree burglary on or about June 28, 2006 (§§ 459, 1170.12), and had served two prior prison terms, for first degree burglary and receiving stolen property, arising out of convictions on or about June 28, 2006 (§§ 459, 496, subd. (a), 667.5, subd. (b)).

On September 8, 2008, defendant agreed to plead no contest to count 1 and to admit the prior prison term allegations, in return for the dismissal of the strike, a maximum prison sentence of five years, and the right to argue for probation.

On October 31, 2008, the trial court denied defendant's request for probation and sentenced him to the agreed-upon five-year lid, consisting of three years on count 1 and two consecutive one-year terms for the prior prison term enhancements.

On November 24, 2008, defendant filed a timely notice of appeal and requested a certificate of probable cause, but the trial court did not rule on that request before the expiration of the 20 days allowed to do so. (Cal. Rules of Court, rule 8.304(b)(2).)

### **DISCUSSION**

Defendant contends that one of his prior prison term enhancements must be stricken as a matter of law because he served only one prison term for both convictions. (§ 667.5, subd. (b); *In re Kelly* (1983) 33 Cal.3d 267, 270; *People v. Jones* (1998) 63 Cal.App.4th 744, 746-747; *People v. Medina* (1988) 206 Cal.App.3d 986, 991.) He also contends that since he challenges only the manner in which the trial court exercised its sentencing discretion within the parameters of the plea agreement, he does not need a certificate of probable cause to raise this claim. (*People v. Buttram* (2003) 30 Cal.4th 773, 777.)

We disagree with defendant's second point. Because he claims the trial court could not lawfully have exercised its discretion to sentence him as it did, his challenge is really a claim that the sentence is unauthorized. Where an allegedly unauthorized sentence was imposed under a plea agreement, the defendant may not attack the sentence on appeal without a certificate of probable cause. (*Cuevas, supra*, 44 Cal.4th at pp. 376-377; *Shelton, supra*, 37 Cal.4th at pp. 763, 769.) The reason is that by bargaining for the agreement he received,

defendant obtained a benefit (the dismissal of his strike) and thereafter entered his plea in the knowledge that he could receive no more than a five-year sentence--a significantly lesser term than he could have received if the strike had not been stricken and he had been convicted after trial. In other words, by entering his plea, defendant acknowledged that the trial court could lawfully impose the maximum sentence under the agreement. (*Cuevas, supra*, 44 Cal.4th at pp. 376-377, 381, 384.) Therefore, his failure to obtain a certificate of probable cause dooms his appeal.

#### **DISPOSITION**

The appeal is dismissed.

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BUTZ, J.

We concur:

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NICHOLSON, Acting P. J.

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RAYE, J.